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Ouseng Sama-Ae v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05–85 OF 2008
ZAINUN ALI, MOHD HISHAMUDIN AND RAMLY ALI JJCA
11 MAY 2010

B

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in bag carried by appellant — Whether appellant rebutted statutory presumption of trafficking on balance of probabilities — Whether trial judge's findings in accord with evidence before him — Whether trial judge's findings at close of defence case at variance with his findings at close of prosecution case in first appeal — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

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D

Acting on information received, a police team ('the team') headed by Assistant Superintendent of Police Ramli Muda ('the ASP') had conducted an observation of a house in Kota Bahru ('the house'). During that surveillance the team had observed Ouseng Sama-Ae ('the appellant'), a Thai national, alighting from a car carrying a red bag ('the bag') slung over his shoulder and making his way to the house. At the house the appellant had allegedly asked for one 'Abang Mat' (Mat), who was not at home. The appellant then took a seat in the veranda of the house waiting for Mat. During this time the bag was near the railing of the veranda. Later when Mat arrived some ten minutes later and while they were sitting having coffee together, several policemen from the team arrived at the house. One of the team introduced himself to the appellant as a police officer. At that point the appellant began to shiver and urinated in his pants. When the bag that the appellant was carrying was searched it was found to contain a substance, which was later confirmed by the chemist to be 1,996.7g of cannabis. The appellant was charged for trafficking in that drug, under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') but when the case came to trial the trial judge found that the prosecution had only succeeded in establishing a prima facie case of a lesser offence of possession of cannabis under s 6 of the Act. The appellant pleaded guilty to possession and was sentenced accordingly. The public prosecutor ('the PP') was however, dissatisfied with the decision of the trial judge in reducing the charge and appealed to the Court of Appeal (the first appeal). Upon appeal the Court of Appeal ('the CA') ruled that the trial judge erred in his ruling that the prosecution had failed to establish a prima facie case of trafficking and in reducing the charge to that of possession. The case was thus remitted back to the High Court with the directive that the same trial judge call for the defence on the original charge of trafficking under s 39B(1)(a) of the DDA. Upon the continued hearing of this case, the appellant, who was called upon to enter his

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evidence, chose to give evidence on oath. His defence was that the bag he was carrying did not belong to him but to one Ayub and that he did not know the contents of the bag. According to him a friend called Ayub had asked him to carry the bag into Mat's house but that when he was dropped off at Mat's house the latter was not in and he was left waiting for Mat's return. After a careful consideration of this defence the trial judge concluded that the defence had failed to raise a reasonable doubt against the prosecution case. He then convicted the appellant of trafficking and sentenced him to death. This was the appellant's appeal against that decision.

Held, dismissing the appeal:

(1) In the present case the CA had already made clear in the first appeal that since the appellant had custody and control and knowledge as to what was in the bag he was carrying, the presumption of trafficking under s 37(da)(vi) of the DDA could be applied against him. Thus, the appellant had to rebut the statutory presumption of trafficking on a balance of probabilities. In his defence the appellant maintained that the bag he was carrying did not belong to him but to one Ayub and that he did not know the contents of the bag. As such, he was disputing the very basic fact on which the presumption depended, and it became necessary to consider whether he had raised a reasonable doubt against the prosecution's case (see paras 9–12).

(2) It was found that the trial judge had given due consideration to the evidence of the defence before concluding that the appellant's explanation of the existence of Ayub could not be accepted. The trial judge also could not accept the appellant's reasons for coming to Mat's house carrying the bag and shivering and urinating in his trousers. In the circumstances, the trial judge's finding that the defence had failed to raise a reasonable doubt against the prosecution's case was correct, fair and just. His findings were in accord with the evidence before him (see paras 16–18).

(3) The appellant's contention that the trial judge's findings at the close of the defence case were at variance with his findings at the close of the prosecution case in the first appeal could not stand. In the first appeal, the CA had overruled the findings made by the trial judge at the close of the case for the prosecution and had ordered the trial judge to call for the defence on the original charge of trafficking. In such a situation the earlier findings made by the trial judge had been expressly or impliedly contradicted or overruled by the CA as a matter of law. Thus it was wrong in law to say that the present grounds of judgment of the trial judge were in conflict with his earlier grounds of judgment (see paras 19 & 21).

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[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, sepasukan polis ('pasukan itu') yang diketuai oleh Penolong Superintendan Polis Ramli Muda ('ASP') telah menjalankan pemerhatian ke atas sebuah rumah di Kota Bahru ('rumah tersebut'). Semasa pengawasan dibuat pasukan itu memerhatikan Ouseng Sama-Ae ('perayu'), seorang warganegara Thai, keluar daripada sebuah kereta membawa beg merah ('beg tersebut') yang disandang di bahunya dan menuju ke arah rumah tersebut. Di rumah tersebut perayu dikatakan telah bertanyakan seorang bernama 'Abang Mat' (Mat), yang tiada di rumah tersebut. Perayu kemudian duduk di beranda rumah tersebut menunggu Mat. Semasa itu beg tersebut berada di rel beranda. Kemudian apabila Mat tiba lebih kurang sepuluh minit kemudian dan semasa mereka sedang duduk minum kopi bersama, beberapa anggota polis daripada pasukan itu tiba di rumah tersebut. Salah seorang daripada pasukan itu memperkenalkan dirinya kepada perayu sebagai pegawai polis. Di saat itu perayu mula menggigil dan terkencing dalam seluarnya. Apabila beg tersebut yang dibawa perayu diperiksa ia didapati mengandungi bahan yang kemudian disahkan oleh ahli kimia sebagai kanabis seberat 1996.7g. Perayu telah dituduh kerana mengedar dadah tersebut di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') tetapi semasa perbicaraan hakim perbicaraan mendapati pendakwaan hanya berjaya membuktikan kes prima facie kesalahan milikan kanabis yang lebih ringan di bawah s 6 ADB. Perayu mengaku bersalah kerana milikan itu dan dihukum sewajarnya. Pendakwaraya bagaimanapun berasa tidak puas hati dengan keputusan hakim perbicaraan kerana telah mengurangkan pertuduhan telah merayu ke Mahkamah Rayuan ('rayuan pertama'). Semasa rayuan, Mahkamah Rayuan ('MR') memutuskan bahawa hakim perbicaraan terkhilaf dalam keputusan beliau bahawa pendakwaan telah gagal membuktikan kes prima facie pengedaran dan mengurang pertuduhan kepada milikan. Kes tersebut telah diremitkan ke Mahkamah Tinggi atas arahan bahawa hakim perbicaraan memanggil pembelaan atas pertuduhan asal pengedaran di bawah s 39B(1)(a) ADB. Semasa perbicaraan sambungan kes ini, perayu yang telah dipanggil untuk memberikan keterangannya, telah memilih untuk memberi keterangan bersumpah. Pembelaannya adalah bahawa beg yang dibawanya bukan miliknya tetapi seorang bernama Ayub dan bahawa dia tidak mengetahui tentang kandungan beg tersebut. Menurutnya seorang kawan bernama Ayub telah memintanya membawa beg itu ke dalam rumah Mat tetapi apabila dia tiba di rumah Mat, Mat tiada dan dia dengan itu telah menunggu Mat pulang. Atas pertimbangan wajar tentang pembelaan ini maka hakim perbicaraan membuat kesimpulan bahawa pembelaan telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Oleh demikian beliau telah mensabitkan perayu kerana pengedaran dan menjatuhkan hukuman mati ke atasnya. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Dalam kes ini MR telahpun menjelaskan dalam rayuan pertama bahawa

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oleh kerana perayu mempunyai jagaan dan kawalan dan pengetahuan tentang apa yang terkandung dalam beg yang dibawanya maka anggapan pengedaran di bawah s 37(da)(vi) ADB boleh terpakai terhadapnya. Oleh itu, perayu perlu mematahkan anggapan pengedaran statutori atas imbangan kebarangkalian. Dalam pembelaannya perayu menegaskan bahawa beg yang dibawanya bukan miliknya tetapi Ayub dan bahawa dia tidak mengetahui kandungan beg tersebut. Oleh itu, dia mempertikaikan fakta atas yang mana anggapan dibuat dan ini perlu untuk mempertimbangkan sama ada dia telah menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 9–12).

(2) Hakim perbicaraan didapati telah memberikan pertimbangan sewajarnya terhadap keterangan pembelaan sebelum memutuskan bahawa penjelasan perayu tentang kewujudan Ayub tidak boleh diterima. Hakim perbicaraan juga tidak boleh menerima alasan perayu untuk ke rumah Mat membawa beg tersebut dan menggigil sehingga terkencing dalam seluarnya. Dalam keadaan berikut, penemuan hakim perbicaraan bahawa pembelaan telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan adalah betul, adil dan wajar. Penemuan beliau sebagaimana menurut bukti di hadapan beliau (lihat perenggan 16–18).

(3) Hujah perayu bahawa penemuan hakim perbicaraan di penutup kes pembelaan adalah berbeza dengan penemuan beliau di penutup kes pendakwaan dalam rayuan pertama tidak boleh dikekalkan. Dalam rayuan pertama, MR telah menolak penemuan yang dibuat oleh hakim perbicaraan di penutup kes pendakwaan dan memerintahkan hakim perbicaraan memanggil pembelaan atas pertuduhan asal untuk pengedaran. Dalam keadaan begini penemuan awal yang dibuat oleh hakim perbicaraan dengan jelas atau tersirat telah ditentang atau ditolak oleh MR atas sebab undang-undang. Oleh itu adalah salah di sisi undang-undang untuk mengatakan bahawa alasan penghakiman hakim perbicaraan ini bercanggah dengan alasan penghakiman beliau sebelum ini (lihat perenggan 19 & 21).]

Notes:

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64, PC (refd)
Pendakwa Raya v Ouseng Sama–Ae [2008] 2 AMR 51, CA (refd)
Yong Su Wan v Public Prosecutor [1998] 3 CLJ 419, HC (refd)

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Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37(da)(vi), 39A(2), 39B, 39B(1)(a), (2)

Appeal from: Criminal Trial No 45–6 of 2002 (High Court, Kota Bahru)

Sivanesan (Vicknaraj, RD Ratnam, Rajesh Kumar & Associates) for the appellant.
Kwan Lisa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judge of the High Court of Kota Bharu who, on 16 June 2008, had convicted the appellant ('the accused') of the charge of trafficking in 1,996.7g of cannabis, a capital offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), and had sentenced him to death under s 39B(2) of the DDA.

[2] The appellant, Mr Ouseng Sama-Ae, is a Thai national. The charge against him states:

> Bahawa kamu pada 10/1/2002 jam lebih kurang 3.20 petang berada di beranda rumah (GDMA 8/1) Kg. Berek, Gong Dermin, Banggu, 16150 Kota Bharu di dalam Jajahan Kota Bharu, di dalam Negeri Kelantan didapati mengedar dadah berbahaya jenis 'Cannabis' berat bersih 1996.7 gram, dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan Akta 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] The present hearing before us is not the first time that this case has come before the Court of Appeal. We shall narrate briefly the history of this case. Earlier, on 17 July 2003, at the trial before the High Court, at the close of the case for the prosecution, the learned trial judge had, after hearing submissions, amended the charge against the accused. The learned judge found that the prosecution had failed to establish a prima facie case of trafficking in cannabis against the accused. The learned judge found that the prosecution had only succeeded in establishing a prima facie case of a lesser offence: the offence of possession of cannabis under s 6 of the DDA, punishable under s 39A(2) of the DDA. When the learned judge called upon the accused to enter his defence on the reduced charge of possession of cannabis, he pleaded guilty and was sentenced accordingly.

[4] The public prosecutor (now the respondent before us) was dissatisfied with the decision of the learned trial judge in reducing the charge to that of possession of cannabis. He appealed to the Court of Appeal. On 20 November

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2007 the Court of Appeal allowed the public prosecutor's appeal. The Court of Appeal ruled that the learned judge erred in ruling that the prosecution had failed to establish a prima facie case of trafficking in cannabis and in reducing the charge to that of possession of cannabis. The Court of Appeal set aside the conviction and sentence of the High Court and remitted the case back to the High Court directing the High Court to call for the defence on the original charge of trafficking under s 39B(1)(a) of the DDA.

[5] On 1 April 2008 the trial before the High Court of Kota Bharu was continued before the same trial judge. In accordance with the direction of the Court of Appeal, the learned trial judge called upon the accused to enter his defence on the original charge of trafficking. The accused elected to give evidence on oath. At the close of the case for the defence, after having heard submissions, the learned Judge found that the accused had failed to raise a reasonable doubt against the prosecution case. He was convicted and sentenced accordingly. The accused appealed to the Court of Appeal against the conviction and sentence. It is this appeal that we are now hearing.

[6] The judgment of the Court of Appeal in the earlier appeal is reported in the law journal (see *Pendakwa Raya v Ouseng Sama–Ae* [2008] 2 AMR 51). The judgment clearly sets out the facts of the case. They are as follows:

> The facts relevant to the appeal are as follows. On 10 January 2002, assistant superintendent of police Ramli Muda ('PW3') acting on information he received proceeded to house GDMA 8/1 at Kampong Berek, Gong Dermin, Banggu, Kota Bharu. He was accompanied by a police party. On arrival at the scene, PW3 and his team lay in ambush. He observed the accused in the veranda of the house. PW5 (Tuan Mazuan bin Tuan Yusof) testified as to how the accused came to be there. This witness was seated under a tree near the house in question. He saw a Kancil motor car arrived. The accused alighted from the car. He was carrying a red bag (exh P18). It was slung over his right shoulder. He went up to the house and knocked on the door. It was opened by Tuan Mazlan bin Tuan Yusof ('PW6'). The accused asked for PW8 (PW6's father). PW8 was not at home at the time. He returned later. PW6 then informed Eyot bt Kidar ('PW7') of the accused's arrival. PW7 emerged for a moment, had a look at the accused and then returned to the kitchen to fetch him some refreshment. The accused then took a seat in the veranda of the house. PW8 then arrived and about 10 minutes passed. It was at this stage that PW3 approached the accused and introduced himself to the accused as a police officer. The accused began to shiver and urinated in his trousers. PW3 seized exh P18 and searched it. In it he found a substance which on subsequent chemical analysis was found to be 1,996.7g of cannabis. The accused was later charged for trafficking in that drug.

[7] The Court of Appeal, in its judgment, explained why on the evidence there was a prima facie case established on the original charge of trafficking under s 39B(1)(a) of the DDA. It is explained in the following manner:

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Now, in order to establish a prima facie case against the accused by the reliance on the presumption under s 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in possession, that is to say that he had 'mens rea possession': see *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585. The first element was easily established here because the accused did have custody and control of the bag. Indeed, it is quite clear from the evidence that he was exercising dominion over exh P18 at all material times. The only question is whether he had mens rea possession. Like any other mental ingredient in an offence, this is to be inferred from the proved and admitted facts of each case.

As Lord Diplock said in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. (Emphasis added.)

Now apply that approach here. The accused came from some other place to the house in question. He brought exh P18 along with him. The drug found in the bag exh P18 — almost 2kg of cannabis — was far in excess of what may be needed for personal consumption. In the absence of any explanation from the accused it is a fair inference the drug was obviously intended for some person, known or unknown to the accused. Or, to borrow the more elegant words of Lord Diplock in *Ong Ah Chuan*, it is a fair inference that the accused's purpose here was to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find.

Now, add to all this the demeanour of the accused when confronted by PW3.

As we have already said, he began shivering and urinated in his trousers. These are sure signs of fear. If taken alone they may be equivocal in terms of evidentiary value. But there is the other evidence to which we have already adverted. And when taken together, the conduct of the accused on being confronted lends strength to the prima facie inference that he had mens rea possession of the proscribed drug. We may add that evidence of the accused's such conduct is plainly admissible by virtue of s 8 of the Evidence Act 1950.

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[8] The Court of Appeal then ruled as follows:

> In our respectful view, the learned trial judge did not adequately evaluate the prosecution's evidence and draw the irresistible inferences admitted by that evidence. Had he done so, he would have come to the conclusion that the prosecution had made out a prima facie case of trafficking. This, then, in our view is the first error into which the learned judge fell.

[9] The Court of Appeal made it very clear that on the evidence and facts of the case the accused had possession of the cannabis. He had custody and control of the bag and had knowledge as to what was inside it, and hence the presumption of trafficking under s 37(da)(vi) of the DDA applies against the accused and that the accused has the burden of rebutting the presumption. The Court of Appeal ruled:

> It was also for him to rebut the presumption of trafficking raised against him by the operation of s 37(da) of the Act.

[10] Section 37(da)(vi) provides:

> Presumptions —
>
> 37 In all proceedings under this Act or any regulation made thereunder—
>
> (da) any person who is found in possession of —
>
> (vi) 200 grammes or more in weight of cannabis;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[11] The accused has to rebut the above statutory presumption of trafficking on a balance of probabilities.

[12] In the present case, however, the accused, in his defence, just like in most cases involving the statutory presumption of trafficking, did not elect to rebut the presumption. Instead, his defence was fundamental in nature: he maintained that the bag did not belong to him and he denied having had knowledge that the bag in question contains cannabis. In other words, he was disputing the very basic fact on which the presumption depends. He denied that he was in possession of the cannabis as he was not aware as to what was inside the bag. This being the position that he had taken, he, therefore, needs only to raise a reasonable doubt against the prosecution's case (see *Yong Su Wan v Public Prosecutor* [1998] 3 CLJ 419). Has he succeeded in doing so?

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[13] In his evidence the accused did not deny having brought the bag to the veranda of the house, but he maintained that he did not know what was inside it. He explained how he came to be associated with the bag. He said that on the day in question, at about 2 in the afternoon, a friend of his by the name of Ayub, whom he had known for 14 years, had asked him (the accused) to accompany him (Ayub) to a place called Gunung. They went in a Kancil car driven by Ayub. The accused sat in front next to Ayub. In the car he saw a red bag placed near Ayub's right leg. While in the car Ayub made a phone call. Ayub then asked the accused whether he had a friend living in that area. The accused told Ayub that he had – a friend whom he called 'Abang Mat'. So they proceeded to the house of the said Abang Mat. On arriving there, Ayub asked the accused to get off the car and to carry the red bag to the house. The accused asked Ayub as to the content of the bag but was told by the latter that he need not have to know.

[14] According to the accused he went up the veranda of the house of Abang Mat carrying the bag with him. Ayub drove off in the Kancil car. He did not know where Ayub went. Ayub only told him that he had to go and fetched something that he had inadvertently left behind. At the veranda the accused sat on the floor, leaning on a wall. He placed the bag near the railing of the veranda. Abang Mat was not at home. While he was sitting, a policeman whom he knew by the name of Minhat came and asked for Abang Mat. The accused got down from the veranda and shook hands with Minhat who was then seated in a car; and he told Minhat that Abang Mat was not at home. Minhat then left the house.

[15] In his evidence, the accused said that about 20 minutes later Abang Mat came home. While he was having coffee with Abang Mat at the veranda, two cars arrived at the house and several policemen alighted from the cars. Minhat was among them. They came to the veranda and one of them by the name of Tuan Ramli opened the bag and said, 'Ini ganja'. The accused said he was frightened and urinated in his pants. He was arrested.

[16] We are satisfied that the learned trial judge had given due consideration to the evidence of the accused. His analysis of the accused's evidence is as follows:

> Pihak pembelaan turut merujuk kepada penjelasan yang diberikan oleh tertuduh kenapa dia telah terkencing dalam seluarnya, iaitu dia telah terperanjat dan berasa takut apabila diserbu oleh orang-orang yang tidak kenalinya. Lebih-lebih apabila salah seorang daripada mereka (SP3) membuka beg merah (eksh P18) sambil berkata 'ini ganja' setelah melihat kandungannya. Menurut peguambela itu, fakta ini tidak boleh dikaitkan bagi menunjukkan pengetahuan tertuduh tentang ganja dalam beg merah tersebut. Saya mendapati pembelaan ini merupakan suatu fikir semula (*afterthought*) kerana tiada SP3 atau mana-mana saksi pendakwa yang lain

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telah diperiksa balas tentang ungkapan yang dikatakan dibuat oleh SP3 itu. Berkenaan dengan pembelaan ini, saya peka bahawa adalah suatu prinsip undang-undang yang mantap bahawa walaupun Mahkamah meragui sesuatu pembelaan yang tidak disarankan atau diletakkan (*which has not been put*) kepada saksi pendakwaan yang berkenaan, mahkamah masih perlu menimbangkan pembelaan ini.

Bagi menunjukkan ketiadaan pengetahuan tertuduh, peguambela terpelajar telah menarik perhatian mahkamah kepada keterangan tertuduh bahawa dia pertama kalinya melihat beg merah itu apabila dia naik kereta Kancil Ayub. Dia kononnya hanya diberikan beg itu untuk dibawa turun setelah sampai di rumah Abang Mat. Dia turut menyatakan Ayub telah menurunkannya di rumah Abang Mat kerana hendak berpatah balik untuk mengambil barang yang tinggal. Dalam hubungan ini, saya mendapati penjelasan yang diberikan oleh tertuduh itu amat tidak munasabah hingga boleh menimbulkan apa-apa keraguan ke atas kes pendakwaan. Pertamanya adalah tidak masuk akal bagi seseorang dalam perjalanan ke suatu tempat untuk menurunkan seorang penumpang yang dibawa bersamanya hanya untuk tujuan berpatah balik bagi mengambil sesuatu barang yang tertinggal. Lebih tidak masuk akal lagi apabila dia turut memberikan barang-barangnya kepada orang itu untuk dibawa turun bersama-samanya. Seperkara lagi saya juga mendapati bahawa keterangan yang diberikan oleh SP6, SP7 dan SP8 juga tidak menggambarkan bahawa tertuduh hanya singgah buat seketika di rumah itu sementara menunggu rakannya mengambilnya semula. Jika benar tertuduh hanya singgah buat sebentar, apa perlunya SP8 menyuruh isterinya SP7 membuat kopi. Lihat juga keterangan SP8 yang berikut yang tidak saya ragui kebenarannya:

> 'Saya Tanya Mat Yie 'Mari mana?' Mat Yie jawab 'Mari balik sana'.

Pada hemat saya keterangan ini jelas menunjukkan bahawa tertuduh baru masuk dari Thailand dan hendak pergi ke rumah SP8, bukan hanya sekadar diturunkan di situ sementara menanti rakannya datang mengambilnya semula.

Keterangan tertuduh ini juga ternyata tidak konsisten dengan keterangan awalnya di mana dia menyatakan beg merah (eksh P18) berada di sebelah kaki kanan Ayub semasa dia memandu. Dengan menyatakan sedemikian tertuduh seolah-olah cuba menunjukkan bahawa Ayub sentiasa mahukan beg itu berada dengannya supaya tidak boleh diakses oleh mana-mana orang lain. Namun keterangannya ini tidak konsisten dengan keterangan yang diberikan selanjutnya apabila dia menyatakan Ayub telah memberikan beg itu kepadanya pula. Walau apa pun saya mendapati adalah amat tidak munasabah bagi Ayub meletakkan beg itu di bahagian kakinya semasa memandu setelah mengambil kira saiz beg itu dan ruang di tempat kaki pemandu kereta itu. Dan lagi, jika benar beg merah itu berada di bahagian kaki Ayub sudah pasti SP5 yang melihat tertuduh turun dari kereta akan melihat pemandu kereta itu memberikan beg itu kepada tertuduh setelah kereta itu berhenti. Dalam keadaan biasa adalah munasabah bagi seseorang pemandu untuk mengeluarkan apa-apa barang yang berada di tempat kakinya setelah kereta itu berhenti sebelum menghulurkannya kepada orang yang turun daripada kereta itu.

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[17] It is clear from the above analysis of the evidence of the defence that the learned trial judge had carefully considered the evidence of the accused and that he did not accept the accused's explanation about the existence of Ayub; about as to how he came to be at the house of the said Abang Mat carrying the bag with him; as to why he shivered and urinated in his trousers upon PW3 discovering the cannabis in the bag that he had carried; and as regards to his knowledge as to the content of the bag. In our judgment, the learned Judge had correctly come to the conclusion that the defence has failed to raise any reasonable doubt; and that the prosecution has proved their case beyond reasonable doubt. He expressed his findings in the following terms:

> Atas alasan-alasan yang dinyatakan di atas, saya dapati pembelaan tertuduh pada keseluruhannya merupakan satu pembelaan yang tidak munasabah yang dapat menimbulkan apa-apa keraguan ke atas kes pendakwaan. Dalam hal ini, saya dapati keterangan saksi-saksi pihak pendakwa adalah boleh dipercayai dan oleh itu, saya terima keterangan mereka sebagai benar. Lantaran itu, setelah menimbangkan dengan teliti kesemua keterangan di hadapan Mahkamah pada keseluruhannya, termasuk eksibit-eksibit, serta mengkaji segala penghujahan kedua belah pihak, saya mendapati pihak pembelaan telah gagal menimbulkan apa-apa keraguan yang munasabah ke atas kes pendakwaan. Oleh itu saya berpuas hati bahawa pihak pendakwa telah berjaya membuktikan kesnya terhadap tertuduh dengan melampaui keraguan yang munasabah, iaitu tertuduh telah memperedarkan dadah berbahaya jenis *cannabis* seberat 1,996.7g pada hari dan di tempat seperti dalam pertuduhan. Seterusnya saya mensabitkan tertuduh atas pertuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952, dan menjatuhkan ke atasnya hukuman gantung sampai mati di bawah s 39B(2) Akta tersebut.

[18] We are satisfied that the learned judge has made a proper appraisal of the entire evidence before him and had arrived at a correct, fair and just decision. His findings are in accord with the evidence before him. We agree with his finding that the account given by the accused is inherently incredible, and hence we see no reason whatsoever to disturb the finding.

[19] Finally, there is one matter which we feel compelled to allude to. It is this. Learned counsel for the appellant, Encik Sivanesan, had submitted that the learned trial judge's findings at the close of the defence case were at variance with his findings at the close of the prosecution case. Learned counsel pointed out that earlier at the close of the case for the prosecution the learned trial judge had already ruled that the prosecution had failed to prove the charge under s 39B of the DDA. Learned counsel referred to the following passages in the earlier grounds of judgment (the judgment that led to the earlier appeal to the Court of Appeal) where the learned trial judge said:

> Daripada keterangan saksi-saksi yang dihuraikan di atas, saya dapati bahawa P18 jelas berada dalam jagaan atau kawalan tertuduh pada masa itu. Bagaimanapun bagi

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A membukтikan milikan sebenar pihak pendakwa hendaklah selanjutnya membuktikan bahawa tertuduh mempunyai pengetahuan tentang dadah yang terkandung dalam beg merah P18.

...

B ...

Berdasarkan kepada penilaian saya ke atas keterangan kes pendakwaan ini saya dapati pendakwa telah gagal untuk membuktikan elemen-elemen milikan sebenar secara terus.

C **[20]** In other words, according to learned counsel, there are now two conflicting grounds of judgments. But in order to better appreciate the point that learned counsel is making, perhaps, I should quote para 9 of his written submission which is as follows:

D 9. In essence the learned Judge convicted the appellant upon the appellant giving sworn evidence, despite having found at the prima facie stage that the evidence of the prosecution witnesses is insufficient to convict him under section 39B of the Act. It is respectfully submitted that the evidence of the appellant corroborates the evidence of the prosecution.

E

[21] With respect to learned counsel, in our judgment there are no conflicting grounds of judgment; nor is there any error of law on the part of the learned judge. It is elementary that once the Court of Appeal (in the earlier appeal) had overruled the findings and rulings of the learned trial judge made F at the close of the case for the prosecution and had instead made a finding of possession of cannabis, had invoked the presumption of trafficking under s 37(da)(vi), and had ordered the learned trial judge to call for the defence on the original charge of trafficking, in such a situation, whatever findings and rulings of the learned trial judge expressed earlier at the close of the prosecution stage, G to the extent that they had been expressly or impliedly contradicted or overruled by the Court of Appeal, as a matter of law, are now no longer of any significance when he proceeded to hear the defence; and he must at the continued hearing stage discard those findings and rulings that he had earlier made. He (as well as the parties before him) must now have due regard to the H findings and rulings of the Court of Appeal as if those findings and rulings of the Court of Appeal had been made by the learned trial judge himself at the close of the case for the prosecution. This being the legal position, it is therefore wrong in law to say that the present grounds of judgment of the learned judge is in conflict with his earlier grounds of judgment. I

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Appeal dismissed.

Reported by Kohila Nesan